

ROCKEY D. EVANS
Claimant

MID CONTINENT SPECIALISTS, INC.
Respondent

**LIBERTY MUTUAL INSURANCE COMPANY
and CONTINENTAL WESTERN INSURANCE
COMPANY**
Insurance Carriers

ORDER

This matter is before the Workers Compensation Board (Board) on remand from the Kansas Court of Appeals in its February 16, 2007 unpublished opinion in No. 95,293. The Kansas Supreme Court denied a petition for review on June 21, 2007. The matter was originally decided by the Board in its award of August 31, 2005. Board Member Julie Sample has recused herself from this matter, having been the Administrative Law Judge (ALJ) who determined the disputes between the parties at the time of the preliminary hearing on May 8, 2002, issuing the preliminary hearing Order dated May 13, 2002. E. L. Lee Kinch was appointed as Board Member Pro Tem for the purposes of hearing and determining this matter.

Claimant appeared by his attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier Liberty Mutual Insurance Company appeared by their attorney, John M. Graham, Jr., of Kansas City, Missouri. Respondent Mid Continent Specialists, Inc., appeared by its attorney, Michael R. Lawless of Lenexa, Kansas. Respondent and its insurance carrier Continental Western Insurance Company appeared by their attorney, Steven J. Quinn of Kansas City, Missouri.

The Board has considered the record and adopts the stipulations as set forth in its Order of August 31, 2005.

ISSUE

What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT

This matter originally came before a Board Member on an appeal from the May 13, 2002 preliminary hearing Order of ALJ Sample. At that time, ALJ Sample had determined that claimant had suffered a series of accidental injuries arising out of and in the course of his employment with Mid Continent Specialists, Inc., with an accident date of December 2001, just before his job changed on January 2, 2002. The Board Member, in his Order of August 29, 2002, affirmed the finding that claimant suffered a series of accidents arising out of and in the course of claimant's employment, with the date of accident occurring through the last day of December 2001, but modified the Order to award medical benefits jointly and severally between Mid Continent Roof & Gutter and Midwest Staffing Solutions, Inc.

The trial of this matter continued, ultimately going to regular hearing on October 14, 2004. At that time, ALJ Kenneth J. Hursh found that claimant had suffered accidental injuries arising out of and in the course of his employment with respondent Mid Continent Specialists, Inc., through a series of injuries to his low back, with an injury date of June 15, 2002, the last date on which claimant worked for respondent. ALJ Hursh went on to find that the impairment ratings provided by board certified orthopedic surgeon Brian E. Healy, M.D., indicating claimant had suffered a 25 percent whole person impairment, and of board certified orthopedic surgeon Edward J. Prosic, M.D., that claimant had suffered a 20 percent whole person impairment, were based on assessments of claimant's condition after the subsequent repetitive injury at Mid Continent Guttering & Siding and the resulting surgery. Neither opinion was found to specify claimant's impairment for the injury sustained at Mid Continent Specialists, Inc., alone. The ALJ found that, as neither rating gave an accurate picture of claimant's impairment for the injury at Mid Continent Specialists, Inc., claimant had failed to prove by a preponderance of the credible evidence any impairment resulting from the injuries with respondent.

The matter was appealed to the Board, which in its Order of August 31, 2005, affirmed the finding of the ALJ that claimant had failed in his burden of proving any permanent impairment from the injuries suffered while working for respondent Mid Continent Specialists, Inc. The Board did modify the Award to find an injury date through a series of injuries culminating on November 5, 2002, the day before claimant's surgery and the last day claimant performed the duties which resulted in his ongoing aggravation.

The Board's Order was appealed to the Kansas Court of Appeals, which, on February 16, 2007, reversed the findings of ALJ Hursh and the Board, finding an injury date in line with the original date of accident found by ALJ Sample in her preliminary Order of May 13, 2002. The Court found that the rationale of *Berry*,³ *Treaster*⁴ and *Kimbrough*⁵ required a finding that claimant suffered a series of accidental injuries arising out of and in the course of his employment, culminating on the last day claimant performed his regular duties for respondent, before he transferred to the light-duty job on January 2, 2002. The matter was remanded to the Board for a determination of the benefits due claimant for an injury suffered on the last day he worked in December 2001.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the matter should be remanded to ALJ Hursh for a determination of the benefits due claimant from a series of injuries culminating on December 31, 2001.

AWARD

WHEREFORE, it is the finding, decision, and order of the Workers Compensation Board that the matter is hereby remanded to Administrative Law Judge Kenneth J. Hursh for a determination of the benefits due claimant for a series of injuries which arose out of and in the course of claimant's employment through a series of injuries culminating on December 31, 2001.

³ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

⁴ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

⁵ *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003).

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Mark E. Kolich, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier Liberty Mutual
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier Continental Western
Michael R. Lawless, Attorney for Respondent Mid Continent Specialists, Inc.
Kenneth J. Hursh, Administrative Law Judge